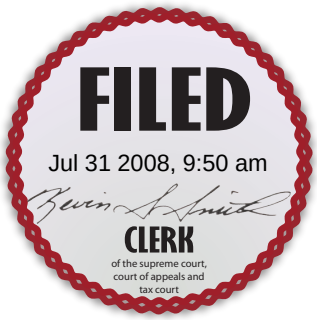

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IN THE
COURT OF APPEALS OF INDIANA

TERRY VERHOEVEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0712-CR-1118
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT NO. 2
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0702-FC-7

July 31, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Terry Verhoeven (Verhoeven), appeals his sentence for operating while intoxicated causing death with a prior conviction, a Class B felony, Ind. Code § 9-30-5-5.

We affirm in part, reverse in part, and remand with instructions.

ISSUES

Verhoeven presents four issues for our review, which we restate as the following three:

(1) Whether the trial court erred in ordering Verhoeven to pay $200 to the Tippecanoe County Public Defender without inquiring into his ability to pay;

(2) Whether the trial court erred in ordering Verhoeven not to operate a vehicle while on probation; and

(3) Whether his sentence is inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

On the morning of February 4, 2007, Verhoeven awoke and ingested Diazepam, Hydrocodone, and Lyrica, all of which had been prescribed to him.[1] After sleeping for a few

[1] Diazepam is used to, among other things, relieve muscle spasms. Hydrocodone is a narcotic pain reliever (opiate-type). Lyrica is a pain reliever that is also used with other medications to treat certain types of seizures. *See* http://www.webmd.com/ (last visited July 1, 2008).

more hours, he left in his car to run errands. While driving on US 52 in West Lafayette, Indiana, Verhoeven struck the back bumper of a pickup truck driven by Charles Meyer (Meyer), propelling Meyer across a median and into oncoming traffic. Meyer collided with a sport utility vehicle driven by Karen Bickel (Bickel). Meyer died as a result of the accident, and Bickel sustained chest contusions, seat belt burns, a broken toe, and permanent nerve damage in her legs.

Officers investigating the crash noticed that Verhoeven's speech was sluggish, that his eyes were watery, and that he had poor balance. While being transferred to the hospital for a blood draw, his speech became even more slurred and sluggish. At the hospital, Verhoeven "would trail off into mumbled jibberish while talking," his "eyes were barely open," and "his head was nodding." (Appellant's App. p. 6). The blood test indicated the prescription drugs Verhoeven had taken as well as a trace amount of marijuana. Verhoeven was then transported to the police department, where he either failed or was unable to perform three field-sobriety tests. A check of Verhoeven's criminal history revealed that he was convicted of operating while intoxicated on December 4, 2002.[2]

On February 5, 2007, the State filed an Information under Cause No. 79D02-0702-FC-7, charging Verhoeven with Count I, operating a vehicle while intoxicated causing death, as a Class C felony, I.C. § 9-30-5-5. On May 31, 2007, the State amended the Information to add: Count II, operating a vehicle with a controlled substance in his blood causing death, as a Class C felony, I.C. § 9-30-5-5(a)(2); Count III, operating a vehicle while intoxicated causing

death with a prior conviction, a Class B felony, I.C. § 9-30-5-5(a)(3); and Count IV, operating a vehicle with a controlled substance in his blood causing death with a prior conviction, a Class B felony, I.C. § 9-30-5-5(a)(2).

On September 18, 2007, Verhoeven entered into a plea agreement with the State. The plea agreement provided, in pertinent part:

> 2. The State and [Verhoeven] agree that this agreement encompasses the following terms: In Cause [No.] 79D02-0702-FC-00007 [Verhoeven] shall plead guilty to Count III, Operating While Intoxicated with a Prior Conviction Causing Death, a B felony. [Verhoeven] shall be sentenced by the Court at the Court's discretion; except that the initial executed sentence shall be no more than eight years. Cause [No.] 79D01-0511-FC-00091 shall be transferred to the above cause and [Verhoeven] shall plead guilty to Count V, Pointing a Firearm, [as a Class A misdemeanor, I.C. § 35-47-4-3,] and the sentence shall be one (1) year with one half year suspended. One term of probation shall be that [Verhoeven] shall not possess any firearms while on probation. The method of execution of the sentences and other terms of probation shall be at the Court's discretion. However, [Verhoeven's] license to drive shall be suspended for the maximum period allowed by law.

(Appellant's App. p. 11). The other charges against Verhoeven were dismissed.

On November 15, 2007, the trial court issued a sentencing order. The trial court sentenced Verhoeven to consecutive terms of seventeen years on Count III and one year on Count V, for a total sentence of eighteen years. The trial court ordered Verhoeven to serve eight-and-a-half years with the Indiana Department of Correction and suspended the remaining nine-and-a-half years to supervised probation. The order listed the conditions of Verhoeven's probation, including that Verhoeven "shall not operate a vehicle while on probation" and that Verhoeven "shall reimburse the Tippecanoe County Public Defender in

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[2] Most of these facts come from the probable cause affidavit, which Verhoeven relies upon substantially in his

the sum of $200.00." (Appellant's App. pp. 18-19). After listing the conditions of probation, the trial court also ordered that Verhoeven's "driver's license is suspended for two (2) years." (Appellant's App. p. 19).

Verhoeven now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Verhoeven contests the imposition of the public defender fee, the condition of probation prohibiting him from driving, and the appropriateness of his prison sentence for Count III, operating while intoxicated causing death with a prior conviction.[3]

I. *Public Defender Fee*

Verhoeven first contends that the trial court erred in ordering him to pay $200 to the Tippecanoe County Public Defender without first determining his ability to pay. The State rightly concedes this point. There are three statutes that address when a defendant must reimburse the county for counsel provided to him at public expense, all three of which require the funds to be deposited in the county's supplemental public defender services fund: Indiana Code sections 33-37-2-3 (formerly I.C. § 33-19-2-3), 33-40-3-6 (formerly I.C. § 33-9-11.5-6), and 35-33-7-6. *May v. State*, 810 N.E.2d 741, 745 (Ind. Ct. App. 2004). A trial court can order reimbursement for costs of representation under any of the three statutes or combination thereof. *Id*. However, all three statutes require the trial court to find that the person is able to pay before ordering reimbursement. *Id*. at 745-46. Here, there is no

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own brief.

[3] Verhoeven does not challenge the appropriateness of his six-month prison sentence for pointing a firearm, as a Class A misdemeanor.

indication that the trial court made such a finding. Therefore, we remand this case to the trial court with instructions to either reverse its assessment of the $200 public defender services fee or to follow the statutory requirements discussed in *May* before imposing the fee.[4]

II. *Order Prohibiting Verhoeven from Operating a Vehicle While On Probation*

Next, Verhoeven challenges the condition of probation prohibiting him from driving while on probation. Before reaching this issue, we must address a related aspect of the trial court's sentencing order. The parties' plea agreement provided that "[Verhoeven's] license to drive shall be suspended for the maximum period allowed by law." (Appellant's App. p. 11). During the sentencing hearing, the State suggested to the trial court that the maximum allowable suspension under the circumstances is two years. The trial court apparently followed the State's lead, stating, "I think there is a mandatory two year license suspension which I will impose as well." (Transcript p. 57). Verhoeven concedes that the trial court made a mistake that would benefit him. Indiana Code section 9-30-5-10(e) provides that if a person has been convicted of an offense under Indiana Code section 9-30-5-5, as Verhoeven was, "the court shall recommend the suspension of the person's driving privileges for at least two (2) years but not more than five (5) years." Therefore, under the terms of the plea agreement, the trial court should have recommended a five-year suspension of Verhoeven's driving privileges. Since this sentencing error is fundamental and apparent on the face of the record, we may consider it for the first time on appeal. *See Rogers v. State*, 270 Ind. 189,

[4] Even if the trial court still wishes to impose the fee, it seems that any decision it makes will need to be revisited after Verhoeven completes his prison term in order to determine his then-current ability to pay. *See*

191, 383 N.E.2d 1035, 1036 (1979). On remand, the trial court shall amend its sentencing order to reflect a license suspension of five years.

Turning to Verhoeven's argument contesting the condition of probation prohibiting him from driving while on probation, we note that, as a general proposition, trial courts have broad discretion in setting conditions of probation, subject to appellate review only for an abuse of discretion. *Freije v. State*, 709 N.E.2d 323, 324 (Ind. 1999). However, under Indiana Code section 35-35-3-3(e), "[i]f the court accepts a plea agreement, it shall be bound by its terms." This statute limits the discretion trial courts normally enjoy in imposing conditions of probation. *Freije*, 709 N.E.2d at 324.

Here, the plea agreement included the following two relevant sentences: "The method of execution of the sentences and other terms of probation shall be at the Court's discretion. However, [Verhoeven's] license to drive shall be suspended for the maximum period allowed by law." (Appellant's App. p. 11). Verhoeven acknowledges that the first sentence granted the trial court general authority to impose conditions of probation. However, he contends that the second sentence, regarding the suspension of his license, "limited the trial court's discretion to require additional conditions of probation relating to [his] driver's license or driving privileges." (Appellant's Br. p. 19). We agree. To say that a person's "license to drive shall be suspended for the maximum period allowed by law" is to say, in effect, that the person "shall not drive" for the maximum period allowed by law. This conclusion finds support in the portion of the Indiana Code that governs suspensions for operating while

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Shepard v. State, 839 N.E.2d 1268, 1271 (Ind. Ct. App. 2005) (Baker, J., concurring) ("I have not yet met a

intoxicated. Specifically, Indiana Code section 9-30-5-10 makes no mention of suspending a person's driver's license; rather, it speaks only in terms of suspending a person's "driving privileges." *See also* I.C. §§ 9-30-5-11, -12, -13, and -14. In sum, by signing the plea agreement, Verhoeven agreed not to drive for the maximum period allowed by law—in this case, five years. Therefore, when the trial court ordered Verhoeven not to drive during his nine-and-a-half-year probation term, he lost one of the benefits of his bargain.

We absolutely agree with the State that, as a general matter, prohibiting driving as a condition of probation would be appropriate in a case such as this "because it is a condition that has a reasonable relationship to the treatment of the accused and the protection of the public." (Appellee's Br. p. 12). In this case, however, the part of Verhoeven's punishment relating to his driving privileges was controlled by the plea agreement.[5] The trial court was bound by the terms of that agreement, which limited the trial court's discretion as to Verhoeven's driving privileges to recommending the maximum suspension of five years. Therefore, the trial court did not have the discretion to impose any conditions of probation that further restricted Verhoeven's driving privileges. *See* I.C. § 35-35-3-3(e); *Freije*, 709 N.E.2d at 324. As such, we instruct the trial court on remand to remove the condition of

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judge who can unerringly predict the future.").

[5] The State argues at length, citing cases from other jurisdictions, that trial courts have the discretion to impose a condition of probation that prohibits the probationer from operating a vehicle during the probation period, even where the probation period exceeds the State's maximum suspension period. As a general matter, the State may be correct, but we leave that question for another day. In *this* case, the trial court was restrained by the terms of the plea agreement to restrict Verhoeven's driving privileges only for the maximum period allowed by the suspension statute.

probation prohibiting Verhoeven from operating a vehicle for the duration of his nine-year probationary period.

III. *Inappropriateness*

Finally, Verhoeven argues that his sentence is inappropriate in light of the nature of his offense and his character. The State responds that Verhoeven waived the right to appeal his sentence in his plea agreement. The State is correct.

Verhoeven's plea agreement included the following provision:

> 8. [Verhoeven] waives his right to appeal any sentence ordered by the court, including his right to seek appellate review pursuant to Indiana Appellate Rule 7(B), and [Verhoeven] further waives his rights, if any, to have sentencing factors considered by a jury. The intention of this paragraph #8 is that [Verhoeven] shall not appeal any issue pertaining to the length of his sentence, portion of his sentence executed, and/or method of sentence execution subject to the Court's discretion herein. [Verhoeven] does not waive his right to appeal terms of probation.

(Appellant's App. p. 12). Verhoeven acknowledges this provision of his plea agreement but argues that it is unenforceable. He noted in his brief, filed on April 22, 2008, that our supreme court had not yet ruled on the enforceability of such waivers. However, on May 21, 2008, our supreme court addressed the issue in *Creech v. State*, 887 N.E.2d 73 (Ind. 2008). In *Creech*, the court held that a criminal defendant can, as part of a plea agreement, waive his right to appeal a discretionary sentencing decision as long as the waiver is knowing and

voluntary. *Id*. at 74. Verhoeven makes no argument that his waiver was not knowing or voluntary. Therefore, we will not address Verhoeven's inappropriateness claim.[6]

CONCLUSION

Based on the foregoing, we conclude that Verhoeven waived any challenge he may have had to his sentence but that the trial court erred by imposing a $200 public defender fee without inquiring into Verhoeven's ability to pay, by suspending Verhoeven's driver's license for two years instead of the maximum period of five years, and by prohibiting Verhoeven from driving as a condition of probation. Therefore, we remand this case to the trial court with instructions to remedy those errors in accordance with this opinion.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, C.J., and ROBB, J., concur.

[6] Verhoeven notes that, notwithstanding the written waiver, the trial court advised him that he had the right to appeal his sentence. The same thing happened in *Creech*. While our supreme court "emphasized the importance of avoiding confusing remarks in a plea colloquy," it went on to state: "By the time the trial court erroneously advised Creech of the possibility of appeal, Creech had already pled guilty and received the benefit of his bargain. Being told at the close of the hearing that he could appeal presumably had no effect on that transaction." *Creech*, 887 N.E.2d at 77. In short, the trial court's mistake offers Verhoeven no quarter.